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No. 81-2336

In the Supreme Court of the United States

OCTOBER TERM, 1982

KARL LINNAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In November 1979, the United States filed this action in the United States District Court for the Eastern District of New York seeking to revoke petitioner's naturalization pursuant to 8 U.S.C. 1451(a). The gravamen of the complaint was that petitioner had procured his citizenship illegally and through willful misrepresentation of material facts, in that throughout his immigration and naturalization process he had concealed from United States authorities his service as an officer at a Nazi concentration camp in Estonia during World War II.

Following trial, on July 30, 1981, the district court ordered petitioner denaturalized (Pet. App. 23a-60a; 527 F. Supp. 426). The court found that petitioner had obtained his citizenship both illegally and through material misrepresentations (Pet. App. 48a-51a). The court of appeals

affirmed in an unpublished order (*id.* at 1a-4a) on the basis of the district court's "thorough and carefully reasoned opinion" (*id.* at 3a).

1. Petitioner contends (Pet. 4-11) that the district court erred in striking his affirmative defense of laches. We note at the outset that petitioner did not raise this issue in the court of appeals, and thus the issue is not properly before this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, the claim has no merit. As the district court explained (Pet. App. 8a), *Costello* v. *United States*, 365 U.S. 265 (1961), is binding authority that there is no such defense to a denaturalization action, at least in the absence of prejudice to the defendant caused by the delay.[1]

As the district court noted (Pet. App. 28a), petitioner did not offer even his own testimony concerning his whereabouts during World War II, nor did he ever suggest any evidence that he would have offered but was unable to locate or produce due to the passage of time. Nowhere in the record or in the petition has petitioner even attempted specifically to demonstrate actual prejudice.[2] Petitioner's general claim of unspecified prejudice due to the passage of time (Pet. 6 n.5) is unavailing. The Second Circuit's rejection of a similar claim in *United States* v. *Oddo*, 314 F. 2d 115, 119, cert. denied, 375 U.S. 833 (1963), is equally applicable here:

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[1]While the Court in *Costello* assumed without deciding that a laches defense might be available in a denaturalization proceeding under certain limited circumstances, it emphasized that, at minimum, the party raising the defense would have to show clear prejudice. See 365 U.S. at 282.

[2]The initial burden of demonstrating prejudice is on the party claiming the laches defense. This is particularly so in the instant case, where the relevant facts are peculiarly within petitioner's knowledge. See, *e.g.*, *Hill* v. *W. Bruns & Co.*, 498 F. 2d 565, 568 (2d Cir. 1974); *Larios* v. *Victory Carriers, Inc.*, 316 F. 2d 63, 66 (2d Cir. 1963).

> It is no more than speculation in the present case that the Government's delay adversely affected [petitioner]; the quality of the Government's proof of fraudulent concealment renders remote the possibility that [petitioner] could have rebutted it more effectively if required to do so at an earlier date, and [petitioner] offered no evidence of his own to substantiate such a possibility. Indeed, since the Government bore the burden of proof, the lapse of time may have been more prejudicial to its case than to [petitioner's]. [3]

2. Petitioner's contention (Pet. 11-22) that the district court violated his privilege against self-incrimination by ordering him to respond to the government's interrogatories is no longer an issue in this case. As the court of appeals explained (Pet. App. 3a), the district court expressly refused to draw any adverse inferences from petitioner's refusal to provide discovery or to testify, relying instead completely on independent evidence (Pet. App. 26a-27a, 28a n.5). Thus, the district court's prior rulings on the Fifth Amendment question had no bearing whatsoever on the final order of denaturalization.[4]

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[3]Petitioner's contention (Pet. 8-11) that there exists a conflict in the lower courts concerning the availability of the laches defense in denaturalization proceedings is baseless. None of the cases cited by petitioner even suggests that a laches defense would be available other than in the circumstances mentioned in the *Costello* dictum—a lack of diligence by the government and substantial demonstrated prejudice to a defendant. See, *e.g.*, *United States* v. *Oddo*, *supra*, 314 F. 2d at 119.

[4]Petitioner's assertion that he was "forced" to admit the authenticity of a photograph and a signature (Pet. 13) is without foundation. At no time in this litigation did petitioner admit a single fact under compulsion. Likewise, petitioner's claim that the trial court denied him permission to attend depositions as a result of his claim of privilege (Pet. 13) is baseless. Petitioner's refusal to take part in the depositions was part of his trial strategy (see Pet. App. 36a), and there is no basis for connecting it to any exercise of asserted Fifth Amendment rights.

3. Petitioner asserts (Pet. 22-47) that the district court erred in considering a number of World War II-era Nazi military records procured from various archives of the Allied Powers, including the Soviet Union. These documents, which were authenticated by their current custodians and certified by the proper consular officials, were admitted into evidence at petitioner's trial pursuant to Rule 902 of the Federal Rules of Evidence and Rule 44(a)(2) of the Federal Rules of Civil Procedure. Petitioner's claim, though presented in the guise of "expert" testimony regarding the evils of the Soviet political system, is, in essence, that some standard higher than mere compliance with the Federal Rules of Evidence and Civil Procedure should be invoked in the case of "Soviet evidence." The district court correctly rejected this argument as "defense by innuendo" (Pet. App. 36a).

a. Petitioner first urges (Pet. 23-25) that the United States government's "non-recognition of the Soviet puppet regime in Estonia" (Pet. 23) is an absolute bar to admission of Estonian documents. But foreign certification, as contemplated by the Federal Rules of Evidence and Civil Procedure, is not subject to the exercise of executive discretion in the field of diplomatic recognition. On the contrary, it is the judicial system's obligation to interpret and apply the various Federal Rules with due consideration for practical reality, the true intent of the Rules, and the effective administration of justice. See *Banco De Espana* v. *Federal Reserve Bank*, 114 F. 2d 438, 442 (2d Cir. 1940).

b. Petitioner's next claim—that certain of the documents admitted against him are outright forgeries (Pet. 25-31)—is equally insubstantial. Petitioner's "evidence" of forgery consists only of testimony concerning the general practices of the Soviet Union. Moreover, petitioner was afforded the opportunity to demonstrate forgery by expert examination

of the *original* documents, and he declined.[5] Hence, he should be foreclosed from claiming that they were forged. Cf. *LeRoy* v. *Sabena Belgian World Airlines*, 344 F. 2d 266, 271 (2d Cir. 1965).

c. Petitioner also contends (Pet. 31-39) that certain documents were admitted although they were not certified in accordance with the Federal Rules of Evidence and Civil Procedure—for example, because Estonian documents were certified by Soviet officials (Pet. 34). This objection was not raised at trial, and hence it is not properly before this Court. See Pet. App. 3a; Fed. R. Evid. 103; *Taylor* v. *Baltimore & O.R.R.*, 344 F. 2d 281, 287-288 (2d Cir.), cert. denied, 382 U.S. 831 (1965). In any event, the court of appeals correctly held (Pet. App. 3a) that "these materials complied with the requirements of the federal rules." The documents contained both an attestation and a final certification by the proper officials as required by Rule 44(a)(2), Fed. R. Civ. P., and Rule 902(3), Fed. R. Evid. Those rules do not embody petitioner's suggested exaltation of form over substance (see, *e.g.*, Pet. 36), but rather contemplate a flexible and open approach to authentication. See 5 J. Weinstein & M. Berger, *Weinstein's Evidence* para. 902(3)[01] (1978); *Hearings of the Special Subcomm. on Reform of the Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 98 (1973); Fed. R. Evid. 902 advisory committee note; *Banco De Espana* v. *Federal Reserve Bank, supra*, 114 F. 2d at 445-446.

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[5]Petitioner, despite repeated notification both before and at trial that the original documents would be available for inspection and expert analysis, declined to have his own document examiner inspect the documents for evidence of the sort of foul play he now alleges. See Appendix on Appeal to the Second Circuit, docket item 88; Trial Record 93, 381, 536-537, 566, 616-617.

d. Finally, petitioner contends (Pet. 39-47) that the deposition testimony was flawed by its Soviet origins. Rather than confront the witnesses, as he was free and able to do,[6] petitioner instead attempts to tar the witnesses with his broad anti-Soviet brush. As with the documentary evidence, these generalized assertions provide no basis for holding the evidence inadmissible. As the trial court observed (Pet. App. 36a-37a; footnotes omitted; emphasis in original):

> Evidence offered at trial through defense witnesses attempted to show that the Soviets, on many occasions, have manipulated and, at times, have manufactured evidence to convict innocent Soviet citizens for the purpose of attaining political objectives of the Soviet Communist party. In essence, defendant contends that we must adopt a *per se* rule excluding all evidence deriving from Soviet sources. In rejecting this contention, we simply note one of the fatal flaws in defendant's broadbush [*sic*] attack on Soviet-source evidence. In the context of this case, the defense witnesses were unable to cite *any* instance in a western court in which falsified, forged, or otherwise fraudulent evidence had been supplied by the Soviet Union to a court or other governmental authority (Record at 470, 597-598, 646).
>
> The defense counsel was unable to come forward with *any* proof that any of the Government's evidence offered at trial, either testimonial or documentary, was incredible or unauthentic in any respect. We find that defendant's defense by innuendo is without any merit.

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[6]The record does not demonstrate that petitioner was unable, financially or otherwise, to attend the depositions. See Pet. App. 4a, 37a.

> Having foresaken [*sic*] its right of cross-examination at the depositions taken in the Soviet Union, the defense cannot now claim foul play.

See also *Schneiderman* v. *United States*, 320 U.S. 118, 119-120 (1943) ("* * * our relations with Russia, as well as our views regarding its government and the merits of Communism are immaterial to a decision of this case. Our concern is with what Congress meant by certain statutes and whether the Government has proved its case under them").

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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